IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 20, 2006 at Knoxville

STATE OF TENNESSEE v. WANDA OVERCAST

Appeal from the Circuit Court for Bedford County
No. 15980 Robert Crigler, Judge

No. M2006-01244-CCA-R3-CD - Filed March 19, 2007

The defendant, Wanda Overcast, appeals her Bedford County incarcerative sentence of nine years on her guilty-pleaded convictions of Class B narcotics sale and delivery. The defendant had sought a probationary sentence or some other form of alternative sentencing, which the trial court rejected. Our review of the record discloses no basis to disturb the trial court's sentencing decision, but we remand the case for merger of the judgment convictions into one judgment.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed and Remanded.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and DAVID H. WELLES, J., joined.

Donna Leigh Hargrove, District Public Defender; and A. Jackson Dearing, III, Assistant District Public Defender, for the Appellant, Wanda Overcast.

Robert E. Cooper, Jr., Attorney General & Reporter; Camerson L. Hyder, Assistant Attorney General; Charles F. Crawford, District Attorney General; and Michael D. Randles and Ann L. Filer, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

On March 20, 2006, the defendant pleaded guilty in the Bedford County Criminal Court to one count of sale of a schedule II controlled substance and one count of delivery of a schedule II controlled substance. *See* T.C.A. § 39-17-417(a)(2), (3) (2006). The presentence investigation report summarized the factual basis in the following fashion: "On May 5, 2005, [the defendant] sold approximately 2.5 grams of crack cocaine to a confidential informant working with the 17th Judicial Drug Task Force. [The defendant] was placed under arrest on December 9, 2005 following the conclusion of this drug sting operation." At the plea submission hearing, the State elaborated somewhat on these facts, but we need not dwell on the underlying facts which were admitted by the defendant.

A sentencing hearing was conducted on May 15, 2006. Officer Shane George testified that he was assigned to the 17th Judicial Drug Task Force. Officer George explained the workings of the drug task force with which he was familiar through his seven years of service. Officer George related that as a member of the drug task force he was familiar with crack cocaine drug activity in Bedford County. Based on his first-hand knowledge, Officer George opined that "there is a crack cocaine epidemic here in Bedford County." He added, "It is probably one of the more wide-spread used drugs in Bedford County." Regarding deterrence from incarceration for such illegal drug activity, Officer George testified that with incarceration "[t]here is a slowing of the distribution; of the use; the bringing in of the drug." From past investigations involving arrests and incarcerative sentences, Officer George testified that incarceration "does great and wonderful things for the community" and that it allows the distributors a chance to "see the error of their ways" and the users "a chance to recover from the addiction."

The defendant testified at sentencing and admitted that she is a 39-year-old crack cocaine drug addict. She said that her addiction began three years earlier, when she "tried it" with some people, and she estimated that the drug took control of her life after she had used it six or seven times. The defendant also admitted to having been addicted to prescription pain medication.

The defendant spoke of her prior criminal history which included a 2005 shoplifting conviction, misdemeanor failure to appear in 2004, and numerous worthless check convictions in 2004. She testified that concerning the worthless check charges, she was told by the court to "pay them" or return to court; the defendant admitted that she did not pay the checks and did not return to court.

The defendant confirmed her prior part-time employment at Prime Steakhouse; the defendant testified that she was "doing drugs" at the time, and after three months, she "just quit going in" to work. The defendant also worked at Sanford Pencil Company, but because of her drug use, she was fired for not showing up for work.

The defendant had been detained in jail for the past five months awaiting sentencing. The defendant testified that her time in jail had taught her "[n]ot to smoke crack," and she insisted that she could refrain from drug use because she "learned [her] lesson being in jail."

On cross-examination, the defendant admitted that she had pleaded guilty in Bedford County to the charge of failure to appear for which she was placed on probation. That probation was subsequently revoked, and the defendant still owes money in that case and in approximately 12 or 13 other cases wherein she had been ordered to pay court costs, fines, and restitution. The defendant also admitted that she had completed an inpatient drug treatment program but that she later resumed using drugs.

The defendant denied selling crack cocaine at any time other than the instant offenses. She informed the court that she supported her $200-a-day drug use by selling shoplifted goods.

At the conclusion of the testimony, defense counsel argued to the court that the defendant was "a good candidate for Community Corrections," and counsel "ask[ed] the Court to consider a split sentence and placing [the defendant] on Community Corrections."

In sentencing the defendant, the trial court noted at the outset that only one narcotics transaction occurred; the charged offenses of sale and delivery were alternative charges, and the court stated that the convictions would merge. The trial court found and applied enhancement factor (2) that the defendant had both a previous history of criminal convictions and a history of criminal behavior in addition to what was necessary to establish the appropriate range, which in the defendant's situation was Range I, standard offender. *See* T.C.A. § 40-35-114(2) (2003). The trial court also found that the defendant's probation in Bedford County had been revoked, thus supporting application of enhancement factor (9) that before trial or sentencing, the defendant failed to comply with conditions of a sentence involving release into the community. *See id*. § 40-35-114(9). The trial court specifically noted that it found no applicable mitigating factors. The defendant's sentencing range was 8 to 12 years, *id*. § 40-35-112(a)(2) (2006), and the trial court applied the two enhancement factors and sentenced the defendant to a term of nine years incarceration. The trial court denied any alternative sentencing based on (1) the defendant's misdemeanor criminal history and the defendant's unwillingness to comply with court orders to pay fines and court costs, (2) the defendant's re-offending drug behavior after undergoing drug addiction treatment, (3) the revocation of the defendant's probation in Bedford County, and (4) the State's evidence through Officer George regarding the crack cocaine problem in the county and the deterrent effect of incarceration.

On appeal, the defendant asks this court to review the record and grant probation. She argues that she does not have a criminal history showing a clear disregard for the law, that she is a favorable candidate for alternative sentencing options pursuant to Code section 40-35-102(5) and (6), that the record did not support the trial court's reliance on deterrence, and that if placed on probation she could find employment to support herself and meet all outstanding debts. As we shall explain, we decline the defendant's invitation to order her sentence to be served on probation and affirm the trial court's sentencing determinations.

Our standard of review is familiar. When the length, range, or manner of service of a sentence is disputed, this court undertakes a de novo examination of the record with a presumption that the determinations reached by the trial court are correct. T.C.A. § 40-35-401(d) (2003). The presumption, however, is predicated "upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). "The burden of showing that the sentence is improper is upon the appellant." *Id*. Should the record fail to reflect the required consideration by the trial court, review of the sentence is purely de novo. *Id*. On the other hand, should the record show that the trial court properly took into account all pertinent factors and that its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In arriving at a sentence, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then decides the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered on enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b) & -35-103(5) (2003); *see State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

We affirm the trial court's judgment and reject the defendant's argument, in the first instance, because she is statutorily ineligible for probation, having received a nine-year sentence. *See* T.C.A. § 40-35-303(a) (2003) (defendant is eligible for probation if the sentence actually imposed is eight years or less).[1]

Additionally, the defendant's reliance on favorable candidacy for alternative sentencing options pursuant to Code section 40-35-102(5) and (6) is misplaced. Code section 40-35-102(6) provides in part that a defendant "who is an especially mitigated or standard offender convicted of a Class C, D, or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(6) (2003). As an offender convicted of a Class B felony, *see id.* § 39-17-417(c)(1) (narcotics violation involving cocaine is a Class B felony if the amount involved is 0.5 grams or more), the defendant in the present case did not enjoy the presumption of favorable candidacy for alternative sentencing. In this situation, the State had no burden to justify a sentence involving incarceration. *See, e.g., State v. Michael W. Dinkins*, No. E2001-01711-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Apr. 26, 2002); *State v. Joshua L. Webster*, No. E1999-02203-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Dec. 4, 2000); *see* T.C.A. § 40-35-103(1) (2003). Thus, the burden of establishing suitability for alternative sentencing rested upon the defendant, and she has failed to demonstrate on appeal that she carried this burden below.

Such was a difficult burden in the present case, and the record that is before us establishes a solid basis for denying alternative sentencing. *See* T.C.A § 40-35-103(1)(C) (confinement may be based, inter alia, upon a finding that "[m]easures less restrictive than confinement have . . . recently been applied unsuccessfully to the defendant"). The trial court made specific findings supported by the record. We agree with the trial court, and we will not belabor our explanation. The defendant had a well-documented history of prior criminal convictions and a substantial – and admitted – history of prior criminal behavior. She chronically refused to obey court

[1] In 2005, the legislature amended section 40-35-303(a) to provide that an offender is eligible for probation if the sentence imposed is ten years or less. T.C.A. § 40-35-303(a) (2006). The amendment applies to sentencing for criminal offenses committed on or after June 7, 2005. *Id.*, Compiler's Notes. The instant offenses were committed May 5, 2005.

orders to pay fines, costs, and restitution, and she violated her probation in one Bedford County case. Indeed, the presentence report recites that the defendant owes the Bedford County clerk's office $10,161.04 in unpaid fines, costs, and restitution. The defendant's sustained drug abuse and addiction, in the face of attempted treatment, bodes continuing criminal conduct if she is not incarcerated and reflects that past efforts at rehabilitation have failed.

In summary, we hold that the lower court did not err in ordering the defendant to serve her nine-year sentence in the Department of Correction, and we affirm the court's judgment. We remand the case, however, for correction of the judgment. The judgment forms should be amended to document properly the merger of the two charges. At present, the record contains two judgments of conviction with two accompanying sentences of nine years. The judgment of conviction relating to the delivery of a controlled substance includes the notation, "Merges with Count One." Only one judgment of conviction should be entered, imposing a nine-year sentence and noting that the defendant's guilty plea and conviction of delivery of a controlled substance is merged into the judgment conviction for sale of a controlled substance.

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JAMES CURWOOD WITT, JR., JUDGE